IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12057 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEEPAKVALLABH MAKWANA

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 12057 of 2004

MR PRAVIN GONDALIYA for Petitioner No. 1

MRAS. HB PUNANI AGP for Respondent No.3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 03/02/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the

order passed against him by Police Commissioner, Rajkot City, on 10th August, 2004, in exercise of powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 10th August, 2004 in pursuance of the above order.

2. The ground of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at subjective satisfaction. Firstly, the fact of filing two criminal cases against the petitioner under the Bombay Prohibition Act and two incamera statements of the witnesses whose identity is not disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act.

3. Two crimes came to be registered against the petitioner, one before Rajkot Taluka Police Station on 18th June, 2004 and second before "B" Division Police Station, Rajkot City on 23rd July, 2004. In the first case, it was alleged that the petitioner was found in possession of 100 ltrs. country liquor, while in second case the petitioner was found in possession of 175 ltrs. country liquor. The detaining authority considered exhaustively and thoroughly investigation papers in both the cases registered against the petitioner. The detaining authority also relied upon two incamera statements as recorded by the sponsoring authority on 1st August, 2004 and verified by the detaining authority on 2nd August, 2004. The witness narrated first incident occurred on 11th July, 2004, the petitioner and his accomplices approached the witness at about 10.00 a.m. and asked him to hire his rickshaw for village Nadiyeri for taking country liquor. The witness was induced by more hire charges, but the witness refused to go to village Nadiyeri with the petitioner in his rickshaw. On refusal, the petitioner got excited and started abusing and beating the witness. The witness stated that the petitioner was harassing innocent person like the witness and for that he would go to the police and file a complaint against the petitioner. On saying so by the witness, the petitioner took out knife and with knife threaten the witness that if any time, witness would make a complaint to the police against them, he would be done to death. The witness was frightened and on shouting a crowd was gathered to watch the incident, but nobody dared to rescue the witness. The witness and his accomplices both to strick terror with open knife rushed towards the persons gathered around and on account of the

fear of the petitioner, the crowd was disbursed. However, by act of supplication, the witness could be saved himself. The second incident is of 10th June, 2004, while the second witness at about 6.00 p.m. was doing business at his business place, one of the accomplices of the petitioner came there and started selling country liquor adjoining the business place of the witness. The accomplice of the petitioner called by the witness and was made leave the place where he was selling country liquor. Therefore, the petitioner along with such accomplices approached the witness with threat that why the witness had driven out his accomplice, who was selling country liquor near the business place of the witness. The witness was beaten by the petitioner and his accomplices. The witness stated that the petitioner and his accomplices were harassing innocent person like witness and for that he would go to the police station and gave information about illegal business of the petitioner. On saying so by the witness, the petitioner was got excited and after taking out knife, with knife threaten the witness that if he would file any complaint before police, he would be done to death. The witness was frightened and by his shouts of help persons were gathered around the place, but nobody dared to rescue the witness. On the contrary, to strick terror, the petitioner and his accomplices rushed towards the crowd with open knife. So on account of fear of the petitioner the crowd was disbursed. By act of supplication the witness could escape. The detaining authority from the above materials came to the conclusion that the petitioner was dealing in storing, selling and transporting the prohibited liquor knowing fully well that liquor was injurious to the public health. The detaining authority also came to the conclusion that the petitioner was head strong person and for his illegal activities, was in habit of picking up quarrels with any persons and was harassing innocent citizens. The detaining authority also came to the conclusion that the activities of the petitioner were prejudicial to the maintenance of public order and adversely affecting the public health. The detaining authority also came to the conclusion that the illegal bootlegging activities of the petitioner were required to be prevented forthwith. After taking into consideration, other measures available against the petitioner in general law, the detaining authority reached to the subjective satisfaction that there was no other alternative, except to detain the petitioner under PASA Act for preventing his illegal anti social activities forthwith. The detaining authority, therefore, passed the order of detention of the petitioner, which is under challenge in this petition.

4. Learned advocate Mr.P.S. Gondaliya, for the petitioner and learned AGP Mrs.H.B.Punani, for the respondent No.3 were heard at length. The affidavit-in-reply as filed by the detaining authority and placed on record by the learned AGP is also taken into consideration.

5. Out of various grounds urged on behalf of the petitioner to challenge the order of detention, as opposed and controverted by the learned AGP, it appears that this petition can be examined and disposed of on the sole issue that whether there was credible material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

6. To reach to the subjective satisfaction that bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the detaining authority must rely upon credible and cogent materials indicating that the activities of the detenu directly or indirectly were causing or were likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or the public health. While undertaking this exercise, the detaining authority must draw a line between the cases falling under "breach of law and order" and "breach of public order". The fall out, reach and impact of the activities of the petitioner must be seriously considered by the detaining authority because the fall out, reach and impact of the activities determines, whether potentiality of the activities alleged, was capable of disturbing the public order, when reach and impact of the activities are so grave, as to affect larger of the society and when widespread danger to life, property or the public health is likely the activities can be branded as activities affecting the public order. The other cases are cases falling within the scope of breach of law and order and can be taken care of by general law.

7. Now firstly, referring to the two cases filed against the petitioner under the Bombay Prohibition Act and going through the investigating papers in those cases, it appears that the said cases were filed against the petitioner because he was found in possession of prohibited liquor in breach of the Bombay Prohibition Act. Those cases are pending and the petitioner shall be tried and may be punished, if he is found guilty, but it

is clear that through the investigating papers of the said cases, which is the basic material on which the detaining authority has placed reliance, do not disclose the impact of activities of the petitioner capable of disturbing the larger section of the society. At the most, these cases may be considered to be breach of law for which as aforesaid the petitioner will be dealt with according to law. Thus, the act constituting criminal offences registered against the petitioner in dealing with prohibited liquor, have no bearing at all on the question of maintenance of public order.

8. The second type of material relied upon by the detaining authority is in the form of two incamera statements contents of which are narrated above. As aforesaid, again it is necessary for the detaining authority to ascertain that the fall out, reach and impact of the alleged activities were capable of involving larger section of the society as to disturb the public order. The pontentiality of the act alleged in the statements must be capable of harming community as a whole or a section of the community. The two incidents narrated in the above two incamera statements, on going through the statements appears to be more individual disputes then to involve the society at large or disturbing the even tempo of the life of the community. Taking both the incidents as narrated by the witness on their face value the same cannot be branded to be the activities so grave or creating that widespread danger to involve society at large or section of community or disturbing the even tempo of the life. This may be the incidents of breach of law and order for which necessary steps may be taken against the petitioner under general law.

9. In the matter of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393, wherein after considering many decisions of the Apex Court, the Division Bench of this Court has observed in paragraphs No.20 and 21 as under.

> "20. The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and T. Devaki v. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly, in T. Devaki, panic amongst people in

the hall in which the incident took place and in nearby vicinity was high lighted. It was also alleged that people were scared and had run helter skelter. In spite of such allegations the Supreme Court held that they were not cases of maintenance of public order and hence, an action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again, in Mustakmiya Jabbarmiya Shaikh v. M.M.Mehta, Commissioner of Police and others, 1995 (2) GLR 1268 (SC), the Supreme Court considered the relevant decisions on point including the decision in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases.

10. Having regard to the facts of the present case, it clearly appears that the facts of this case, are squarely covered by the above decision, in the matter of Ashokbhai Jivraj @ Jivabhai Solanki [supra]. In this view of the matter, the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order and public health by the alleged activities of the petitioner, cannot be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

11. In the result, in view of the above discussion, The petition is allowed. The order passed by the Commissioner of Police, Rajkot City on 10th August, 2004, against the petitioner in exercise of powers under Section 3(2) of the PASA Act is hereby quashed and set aside. The detenu DEEPAKVALLABH MAKWANA is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

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